ATTORNEY FOR APPELLANT:

PATRICIA CARESS McMATH
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT KEITH SULLIVAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A04-0609-CR-515
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable David Holt, Judge
Cause No. 28D01-0507-FA-514

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

On appeal from the revocation of his probation, Robert K. Sullivan raises one issue: whether the court should have granted his motion to dismiss the notice of probation violation because Sullivan "did not acknowledge that he understood the conditions of probation before the alleged violation occurred." Appellant's Br. at 2. We affirm.

Facts and Procedural History

On July 25, 2005, the State filed an information charging Sullivan with dealing in methamphetamine,[1] a class A felony, and possession of more than three grams of methamphetamine,[2] a class C felony. On October 4, 2005, Sullivan signed a negotiated plea agreement, which revealed his intent to plead guilty to the latter charge and the State's intent to dismiss the former charge. Appellant's App. at 36. The agreement also provided that the State would recommend a sentence of four years at the Greene County Jail, with two suspended, "to be served on work release if eligible." *Id*. In addition, the agreement indicated: "Probation for two years on several terms and conditions as imposed by the Greene Superior Court, to include an evaluation for substance abuse and any and all treatment deemed necessary." *Id*.

On November 3, 2005, the court held a hearing at which it approved the proposed plea agreement. We include the following relevant excerpts from that hearing:

> **The Court:** The Negotiated Plea Agreement that has been agreed upon by you and your attorney and the prosecuting attorney is for the four years that the

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[1] *See* Ind. Code § 35-48-4-1(a)(2), -(b)(1).

[2] *See* Ind. Code § 35-48-4-6.

> legislature considers to be the appropriate sentence, although the Negotiated Plea Agreement is calling for two years of the . . . of the four years to be suspended. But it would mean that you would serve two years, and then you would have two years in effect hanging over your head. *You would be required to comply with certain conditions of probation. You would need to understand that if you failed to comply with conditions of probation then you would be returned to incarceration for the remaining two years. Do you understand that?*
> **[Sullivan]:** *Yes Sir*.

Id. at 71 (emphases added).

> **The Court:** Alright. In short, what [defense counsel] is indicating is that the Negotiated Plea Agreement can be changed to show that you will be sent to four years in the Greene County Jail rather than four years in the Indiana prison system. Doesn't change the two years recommended for work release. *What we're really talking about is if you do not do what you're supposed to do either while on work release or on probation, where are you then sent. To jail or to prison.*
> **[Sullivan]:** *Okay.*

Id. at 79 (emphases added).

> **The Court:** . . . . Now *you are going to be on supervised probation for two years, and it will be on certain terms set out in the Order of Probation.* Upon your acceptance, if you are accepted into the work release center, within three days you're going to be required to report to the Greene County Alcohol and Drug Services Office. Greene County Alcohol and Drug Services Office is an arm of the Court. The [director] will be giving you an assessment. The purpose of the assessment is to determine to what extent there is a continuing problem with controlled substances or with alcohol. Depending upon that assessment, you may be referred into a treatment program or you may be referred into an educational program, but you must do whatever is recommended by the [director] to address those addiction concerns, and you must understand that that is a condition both of work release and staying out of jail for the extra two years. . . .
> When you are released from incarceration, you will be required to report to the Greene County Probation Office. You will get a copy of the Order of Probation today, but you'll be required to meet with the Greene County Probation Officer, will make sure that they . . . they will go over and make sure that you understand the conditions of probation.

> *I want you to understand that one of the conditions will be that you be monitored for alcohol and controlled substance use and I'm . . . that means urine screens, and these substances will be discovered if you have used. . . . You're going to be given conditional liberty, and we will see how you handle that. Now you have professed to have no further desire to use meth or any controlled substance. I don't think it's going to be easy, but your behavior is going to be monitored. You're going to be subject to screens, and we're going to see if you can do what you think you can do. . . . .*
>
> *I want you to succeed. I also want you to know that if you do not comply with these terms and conditions, I won't hesitate to send you back to jail.*

Id. at 90-93 (emphases added).

That same day, while still in open court, the trial judge signed Sullivan's Pronouncement of Sentence and Order of Probation. *Id*. at 41-45. The Order of Probation included the following pertinent provisions:

> 2. You shall not commit another criminal offense. You shall obey all rules as prescribed by this Court and the Greene County Probation Officer.
> . . .
> 9. You shall not use, possess, or transport any controlled substances, unless legally prescribed by a duly licensed physician. When so Ordered by a law enforcement officer, Probation Officer, or Community Corrections Director, you shall report within one hour of being so ordered to a place ordered by such Officer to submit yourself to any urine screen or chemical test to determine whether you have ingested any controlled substance. . . . .

Id. at 43-44.

"[A]pproximately three days later[,]"[3] Sullivan received a copy of the Order of Probation. Tr. at 25 (Sullivan's testimony from August 16, 2006 hearing). However, neither Sullivan nor a probation officer signed the Order of Probation, and there is no indication that a probation officer reviewed the Order of Probation with Sullivan. On November 29, 2005,

[3] Incidentally, November 3, 2005 was a Thursday; hence, three days later would have been Sunday,

case manager Justin Dodd advised Sullivan of the work release rules and regulations, which required drug screens and prohibited the use or possession of any controlled substances. *Id*. at 16. Sullivan signed the written work release rules. *Id*.

During a random drug screen administered on March 10, 2006, Sullivan tested positive for cocaine. App. at 101; Tr. at 16, 62. When asked if he "did, in fact, use cocaine which [he] tested positive for on March the 10th of 2006," Sullivan responded: "Yes, I'm not denying it." Tr. at 27 (revocation hearing). The State followed up immediately with: "And would you acknowledge that you violated the law by using cocaine." *Id.* at 28. Sullivan replied, "Yes." *Id*. On March 30, 2006, the State filed a petition to modify Sullivan's placement from work release to the Greene County Jail. App. at 49-50. On April 3, 2006, the State filed a petition to revoke Sullivan's suspended sentence and cited the failed drug screen as a violation of probation. *Id*. at 51-52.

On May 16, 2006, Sullivan filed a motion to dismiss the petition to revoke his suspended sentence. *Id.* at 58. In his motion, Sullivan asserted that he "was not adequately informed of the conditions of probation consistent with Ind. Code § 35-38-2-2.3(b)." *Id*. On August 16, 2006, the court held a hearing on both the motion to dismiss and the petition to revoke. At that hearing, the court took evidence, and the parties agreed that the petition for modification of placement was moot. That day, the court issued an Order Revoking a Portion of Suspended Sentence and Continuing Probation. App. at 7. Specifically, the court revoked Sullivan's "suspension of one year," and committed him to the Greene County Jail. *Id*. The

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November 6, 2005.

order noted that upon release from incarceration, Sullivan's "probation shall continue on the same terms and conditions." *Id.*

Discussion and Decision

Citing Indiana Code Section 35-38-2-2.3(b) and *State v. Allen*, 809 N.E.2d 845, 847 (Ind. Ct. App. 2004), *trans. denied*, Sullivan asserts that the trial court "did not orally advise [him] at sentencing of all the conditions of his probation and specifically did not advise [him] of the condition that he not possess, use or transport controlled substances." Appellant's Br. at 4. Likening his case to *Allen*, Sullivan contends that the written probation conditions were never explained to him, that he never acknowledged that he understood the conditions of probation, and that therefore his motion to dismiss should have been granted.

Our legislature has provided that when a person is placed on probation,

> the person *shall* be given a written statement specifying:
> (1) the conditions of probation; and
> (2) that if the person violates a condition of probation during the probationary period, a petition to revoke probation may be filed before the earlier of the following:
> (A) One (1) year after the termination of probation.
> (B) Forty-five (45) days after the state receives notice of the violation.

Ind. Code § 35-38-2-2.3(b) (emphasis added). This particular provision does not require the court or a probation officer to review the written conditions or ensure that the defendant understands them.

In *Allen*, the defendant "never received the written conditions of probation," and the trial court granted Allen's motion to dismiss the probation violation. 809 N.E.2d at 846. Concluding that the "trial court did not err by ordering the dismissal of the notice of probation violation[,]" a panel of this court reiterated that Allen "*never received a written*

copy of the conditions of his probation prior to his alleged violation of probation" and further noted:

> [a]lthough the oral advisement of the conditions of probation is fairly specific, there is no evidence in the record showing Defendant's acknowledgement and understanding of the conditions of his probation. The trial judge pro tempore announced that the oral advisement was the order of the court and then turned to the issue of when Defendant could report for work release. The judge did not ask Defendant if he acknowledged and understood the conditions. For the error to be harmless, as the State suggests, the record would need to indicate such.

Id. at 848 (emphasis added). There is no dispute that Sullivan received a written copy of the conditions of his probation. As such, we find *Allen* inapposite.

In reviewing Sullivan's case, we look to the intent of Indiana Code Section 35-38-2-2.3. Although citing a prior version of the statute, we have stated that the intent of the provision is "to provide a defendant with prospective notice of the standard of conduct required of him or her while on probation and to prohibit the imposition of additional conditions after sentencing." *Kerrigan v. State*, 540 N.E.2d 1251, 1252 (Ind. Ct. App. 1989). The intent may also be achieved if the conditions are specified in the record, as required by Indiana Code Section 35-38-2-1(a),[4] in the defendant's presence, and understood by him. *See id*. "Thus, although the trial court commits error in not providing the defendant with a written statement of the conditions, the error is harmless if there is otherwise substantial compliance with the intent" of providing a defendant with prospective notice of the standard of conduct required of him or her while on probation and prohibiting the imposition of

[4] Indiana Code Section 35-38-2-1(a) requires that whenever it places a person on probation, the court shall specify in the record the conditions of probation and advise the person that violation thereof may lead to a petition for revocation. Sullivan does not cite this section on appeal. As the excerpts from the transcript

additional conditions after sentencing. *Id.*; *see also White v. State*, 560 N.E.2d 45, 48 (Ind. 1990) (finding find no reversible error where substantial compliance occurred, and defendant received written probation instructions three weeks after his sentencing, thus "having ample time to comply with them."); *Seals v. State*, 700 N.E.2d 1189, 1191 (Ind. Ct. App. 1998) (affirming revocation of probation where defendant failed to report to probation officer, a violation of oral condition of probation).

Providing prospective notice is particularly important where an unusual or case-specific condition of probation is set out. *See*, *e.g.*, *Atkins v. State*, 546 N.E.2d 863, 865-66 (Ind. Ct. App. 1989) (holding that it was error for trial court *not* to provide defendant with condition of his probation requiring him to obtain permission before leaving the premises of retirement center either orally or in writing at sentencing, and stating, "defendant's probation cannot be revoked for a violation of this non-existent condition of his probation."); *see also White*, 560 N.E.2d 45 (requiring "ten days of alternative service" as a condition of probation); *Lucas v. State*, 501 N.E.2d 480, 481 (Ind. Ct. App. 1986) (noting that Lucas's possession of a firearm in his home was not a crime; concluding that the "so-called 'order of probation' delivered to Lucas by a probation officer a year after his sentencing has no effect and Lucas's probation cannot be revoked for alleged violation of a non-existent term of probation"; and reversing probation revocation where probation terms were not entered into record).

In the present case, however, the alleged violation did not concern an obscure or

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reveal, the court did advise Sullivan that probation conditions would be imposed, that he would be screened for drugs, and that if he violated any conditions, he would be sent to jail.

special condition of probation. Rather, the petition to revoke Sullivan's probation was based upon a failed random drug screen. The positive test result implied that Sullivan had possessed cocaine, which of course, would constitute a crime.[5] Pursuant to Indiana Code Section 35-38-2-1, if a defendant "commits an additional crime, the court may revoke the probation." Indeed, we have confirmed that, by statute, "probation may be revoked if the person commits another crime." *Jaynes v. State*, 437 N.E.2d 137, 139 & n.2 (Ind. Ct. App. 1982).

Given that refraining from committing a new crime is "automatically a condition of probation by operation of law without a specific provision to that effect," it is "not necessary" to advise a defendant not to commit an additional crime as a condition of probation. *Atkins*, 546 N.E.2d at 865; *Jaynes*, 437 N.E.2d at 139 (affirming probation revocation based on commission of theft while on probation, regardless of fact that "[n]o terms or conditions of probation were specified in the [probation] order."); *Boyd v. State*, 481 N.E.2d 1124, 1127 (Ind. Ct. App. 1985) (noting that since defendant was subject to statutorily imposed condition that he not commit additional crime during probation, court's failure to instruct Boyd to refrain from committing criminal offenses as a condition of his probation was harmless error as it neither prejudiced him nor deprived him of any fundamental right); *Harder v. State*, 501 N.E.2d 1117, 1120 (Ind. Ct. App. 1986) (noting, "it is unnecessary for a trial court to specify that a defendant not commit an additional crime

[5] *See* Ind. Code § 35-48-4-6.

during probation").[6] Applied here, it was not necessary for the court to have advised Sullivan to refrain from committing a new crime as that was automatically a condition of probation by operation of law without a specific provision to that effect.

Moreover, "probation may be revoked even where the State has not convicted [the] defendant of the additional crime by establishing his guilt beyond a reasonable doubt, or by entering [the] defendant's plea of guilty. It is only necessary that the trial court find by a preponderance of the evidence that the defendant committed an additional offense." *Boyd*, 481 N.E.2d at 1126; *see also Williams v. State*, 695 N.E.2d 1017, 1018 (Ind. Ct. App. 1998) ("A revocation hearing is in the nature of a civil proceeding, so the alleged violation need be proven only by a preponderance of the evidence.").

To recap, four months after pleading guilty to possession of methamphetamine, Sullivan tested positive for cocaine in a random drug screen. When directly asked, Sullivan confirmed that he had used cocaine prior to failing the drug screen. In addition, Sullivan admitted that he knew he violated the law by using cocaine. In light of these facts, we conclude that the State proved by a preponderance of evidence that Sullivan violated probation. Therefore, the trial court did not err in denying Sullivan's motion to dismiss. Likewise, the court was well within its discretion in revoking Sullivan's probation.[7]

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.

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[6] As should be obvious, since not committing new crimes is a statutory probation condition, there can be no argument that it constitutes the imposition of an *additional* condition *after* sentencing.

[7] Having reached this conclusion, we encourage courts to reiterate to defendants that probation may

be revoked if the State shows by a preponderance of evidence that a defendant has committed a new crime.